

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TONY NEVAIL MYERS,

APPELLANT

APPELLATE CASE NO. 2018-000474

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by trying Appellant *in absentia* when there was no evidence Appellant (1) received notice of his right to be present and the term of court for which he needed to be present, and (2) was warned he would be tried in his absence should he fail to attend?

STATEMENT OF THE CASE

A Horry County Grand Jury indicted Appellant on May 26, 2016 for assault with intent to commit criminal sexual conduct, third degree. R. 275-276. His case was called to trial on February 27, 2018 before the Honorable Steven H. John, and a jury. R. 1. Appellant was tried in his absence after he did not appear for trial. R. 55, l. 18 – 56, l. 6. Assistant Solicitors Mary- Ellen Walters and Leigh Andrew represented the state, and James C. Galmore, III represented Appellant. R. 1.

On March 1, 2018, the jury found Appellant guilty of the lesser included offense of assault and battery, first degree. R. 251, ll. 4-16. On March 13, 2018, the sealed sentenced was opened before Judge John. R. 260. Appellant was sentenced to nine years imprisonment. R. 262, ll. 19-24; R. 277.

This appeal follows.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Ravenell, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010) (citing State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006)). “An appellate court is bound by the trial court’s factual findings unless they are clearly erroneous.” Id. (citing Banda, 371 S.C. at 251, 639 S.E.2d at 39).

ARGUMENT

The trial judge erred by trying Appellant *in absentia* when there was no evidence Appellant (1) received notice of his right to be present and the term of court for which he needed to be present, and (2) was warned he would be tried in his absence should he fail to attend.

How the Issue was Presented Below

On the morning of the second day of trial, after the jury had been selected, defense counsel moved for a continuance to ensure Appellant's presence at trial. Counsel argued there was no evidence Appellant was warned he would be tried in his absence if he failed to appear. R. 33, l. 21 – 34, l. 13.

In response to Appellant's motion, the state presented a certified copy of bond paperwork allegedly signed by Appellant, which stated, "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend court, the trial will proceed in my absence." R. 36, l. 19 – 37, l. 3; R. 267-268. The bond paperwork was marked as State's Exhibit No. 1. The employee of the Clerk of Court through whom the bond paperwork was introduced admitted she did not personally see Appellant sign the form nor was she aware whether the magistrate verbally advised Appellant he could be tried in his absence before Appellant allegedly signed the form. R. 38, ll. 2-12.

The state also presented the testimony of Assistant Solicitor Josh Holford. Holford testified that an arraignment hearing was held in Appellant's case on April 17, 2017. Although Holford could not recall whether he was the assistant solicitor who represented the state at the hearing, he maintained the presiding judge signed a document referred to as the "arraignment findings." R. 40, l. 1 – 41, l. 10. This document was marked as State's Exhibit No. 2. R. 271. A checklist which accompanied the "arraignment findings" stated, "You also realize that if you do

not show up when your case is called for trial, that you can be tried in your absence and if you are convicted then your sentence will be sealed and opened when you are brought back before this Court.” R. 41, ll. 3-10; R. 272. However, Holford admitted Appellant did not sign this form. R. 43, ll. 7-9. Moreover, Holford had no knowledge regarding whether that advisement was read to Appellant during the hearing. R. 41, ll. 11-14.

The state also presented a subpoena for Appellant for the week of trial, which was marked as State’s Exhibit No. 3. R. 44, ll. 23-24; R. 273-274. An administrative assistant with the solicitor’s office testified she mailed the subpoena to the address for Appellant that was listed on the bond form and the application for a public defender. She maintained the office never received information that Appellant had changed his address. R. 44, l. 23 – 45, l. 9. However, the assistant admitted the subpoena was not sent via certified mail nor was a return receipt requested. She did not have a return receipt indicating Appellant actually received the subpoena. Moreover, the assistant admitted the subpoena was not hand served on Appellant by a sheriff’s deputy. R. 46, l. 10 – 47, l. 4.

Lastly, the state presented the testimony of Assistant Solicitor Leigh Andrew, who was part of the team prosecuting Appellant. Andrew testified that at some point during the previous day she found defense counsel in the antechamber of the courtroom and told him that their case was being called to trial. When defense counsel asked which case, Andrew “said Tony Myers [Appellant].” Andrew claimed counsel “said this is Mr. Myers here with me now, and then Mr. Myers began to speak with [her] about the case.” According to Andrew, Appellant “said that he was just being honest with me and real and that he was not prepared to go forward with the trial today.” R. 48, l. 1 – 49, l. 7. Andrew claimed Appellant knew his case was being called to trial because “he was standing there when I told Mr. Galmore [defense counsel] that the case had

been called to trial.” R. 49, ll. 8-11. However, Andrew admitted she did not advise Appellant that he would be tried in his absence if he did not appear. R. 50, ll. 6-8.

To conclude, the assistant solicitor argued there was ample evidence that Appellant had been advised he would be tried in his absence if he did not attend trial. She claimed he was advised by the bond paperwork and that there was “strong circumstantial evidence that he was advised during the arraignment.” R. 51, ll. 1-12. Defense counsel renewed his motion for a continuance to ensure Appellant’s presence during the trial emphasizing that Appellant was facing a felony conviction and up to ten years imprisonment. R. 51, ll. 15-18.

Citing to State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007), City of Aiken v. David Michael Koontz, 368 S.C. 542, 629 S.E.2d 686 (Ct. App. 2006), and State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554 (2010), the trial judge denied the motion for a continuance and ordered the trial would proceed in Appellant’s absence. Based on the subpoena and Appellant’s presence the previous day, the judge found Appellant had actual notice that his trial would take place that particular week, and by his absence, voluntarily waived his right to be present at trial. Moreover, despite acknowledging there was no evidence Appellant actually signed the bond paperwork and no evidence Appellant was advised so during his arraignment, the judge found, based on this paperwork alone, that Appellant was warned he would be tried in his absence if he did not appear. R. 52, l. 4– 56, l. 6.

Discussion

The trial judge erred by trying Appellant *in absentia* when there was no evidence Appellant received proper notice of his right to be present and the term of court for which he needed to be present, and was warned he would be tried in his absence if he failed to attend. The state failed to properly serve Appellant with the subpoena notifying him of the term of court in

which his case would be tried. Moreover, there is no evidence Appellant was advised during his bond hearing or arraignment that he would be tried in his absence if he did not appear, or that he actually signed the bond form which contained this warning.

“It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence.” State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010) (citing State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007) and State v. Goode, 299 S.C. 479, 481, 385 S.E.2d 844, 845 (1989)); See also Rule 16, SCRCrimP (“Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.”). “A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence.” Id. at 455-456, 692 S.E.2d at 557-558 (citing State v. Patterson, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006)); See State v. Jackson, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986). “The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend.” Id. at 456, 692 S.E.2d at 558 (citing Patterson, 367 S.C. at 229, 625 S.E.2d at 244).

“In order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court’s finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in

his absence if he failed to attend, a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal.” Id. (citing State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987)). “Additionally, notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial.” Id. (citing Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976) and Fairey, 374 S.C. at 100, 646 S.E.2d at 448). “Further, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear.” Id. (citing Fairey, 374 S.C. at 101, 646 S.E.2d at 449).

“The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice.” Id. (citing Ellis, 267 S.C. at 261, 227 S.E.2d at 306).

In State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017), this Court reversed Wrapp’s convictions and sentence after holding the trial court erred by trying Wrapp *in absentia* without making the requisite factual findings concerning whether Wrapp voluntarily waived his right to be present at trial. Id. at 536, 808 S.E.2d at 823. More specifically, this Court held the trial court failed to make specific findings that Wrapp received notice of his right to be present and the term of court for which he needed to be present, and was warned he would be tried in his absence if he failed to attend. Id.

Here, the trial judge erred by finding Appellant received proper notice of the term of court in which his case would be tried because there was no evidence Appellant actually received the subpoena, which was the procedure used by the state to provide Appellant with notice. The

administrative assistant with the solicitor's office admitted she did not send the subpoena through certified mail nor did she request a return receipt. R. 46, l. 10 – 47, l. 2. Additionally, the state failed to hand serve Appellant with the subpoena by way of a sheriff's deputy. R. 47, ll. 3-4.

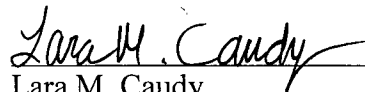
Likewise, the trial judge erred by finding Appellant was warned he would be tried in his absence if he did not attend trial. There was no evidence Appellant was advised by the magistrate during his bond hearing that he could be tried in his absence or that Appellant actually signed the bond form which indicated he would be tried in his absence if he did not attend trial. R. 38, ll. 2-12. Similarly, there was no evidence that the circuit court judge informed Appellant during his arraignment hearing that he could be tried in his absence. R. 41, ll. 11-14. Significantly, Appellant's signature does not appear on the arraignment findings or the accompanying checklist. R. 43, ll. 7-9; R. 271-272.

Because there is no evidence to support the trial judge's finding that Appellant voluntarily waived his constitutional right to be present at his trial, this Court should reverse his conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of October, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

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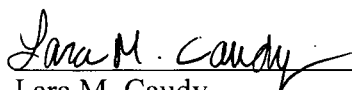
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tony Nevail Myers states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial, which was held on February 27, 2018 through March 1, 2018, and, Appellant's sentencing hearing, which was held on March 13, 2018, both before the Honorable Steven H. John. In her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Tony Nevail Myers.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of October, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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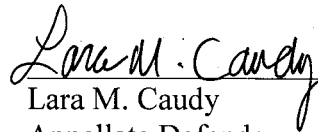
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Complete Trial Transcript Dated February 27 through March 1, 2018;
- (2) Complete Sentencing Transcript Dated March 13, 2018;
- (3) State's Exhibit No. 1 (Bond Form);
- (4) State's Exhibit No. 2 (Arrest Findings);
- (5) State's Exhibit No. 3 (Subpoena);
- (6) True-Billed Indictment;
- (7) Sentence Sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

October 31, 2018


Lara M. Caudy
Appellate Defender

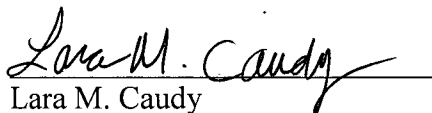
S.C. Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 31, 2018.

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
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Honorable Steven H. John, Circuit Court Judge

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THE STATE,

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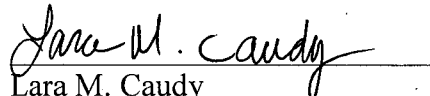
V.

TONY NEVAIL MYERS,

APPELLANT


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant, Designation of Matter, and Record on Appeal in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant, Designation of Matter, and Record on Appeal has been served upon Tony Nevail Myers, #298741, at Allendale Correctional Institution, P.O. Box 1151, Highway. 47, Fairfax, SC 29827, this 31st day of October, 2018.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of October, 2018.



Notary Public for South Carolina
My Commission Expires: September 27, 2028.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

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Honorable Steven H. John, Circuit Court Judge

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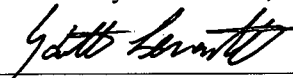
CERTIFICATE OF SERVICE

I certify that a copy of the Record on Appeal in the above-referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of October, 2018.



Tyler Cheney
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 31st day of October, 2018.



(L.S.)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.